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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/773,351	01/31/2001	Daniel H. Macc	00.22US	5974

7590 03/26/2002

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EXAMINER

WILLIS, MICHAEL A

ART UNIT PAPER NUMBER

1617

DATE MAILED: 03/26/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application No.

09/773,351

Applicant(s)

MAES ET AL.

Examiner

Michael A. Willis

Art Unit

1617

--The MAILING DATE of this communication appears in the cover sheet with the correspondence address --

THE REPLY FILED 12 March 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a)  The period for reply expires 3 months from the mailing date of the final rejection.
- b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

- 1.  A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
- 2.  The proposed amendment(s) will not be entered because:
  - (a)  they raise new issues that would require further consideration and/or search (see NOTE below);
  - (b)  they raise the issue of new matter (see Note below);
  - (c)  they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d)  they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_.

- 3.  Applicant's reply has overcome the following rejection(s): See Continuation Sheet.
- 4.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
- 5.  The a)  affidavit, b)  exhibit, or c)  request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
- 6.  The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
- 7.  For purposes of Appeal, the proposed amendment(s) a)  will not be entered or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

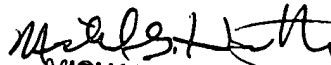
Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 1-20.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

- 8.  The proposed drawing correction filed on \_\_\_\_\_ is a)  approved or b)  disapproved by the Examiner.
- 9.  Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
- 10.  Other: \_\_\_\_\_

  
MICHAEL G. HARTLEY  
PRIMARY EXAMINER

  
Michael A. Willis  
Patent Examiner

Continuation of 3. Applicant's reply has overcome the following rejection(s): Applicant's amendment to claim 18, submitted 12 March 2002, is entered. The rejection of claim 18 under 35 USC 112, 2nd paragraph is withdrawn due to correction of a typographical error. The objection to the specification is withdrawn based on applicant's argument that the material incorporated by reference is not essential but rather background material..

Continuation of 5. does NOT place the application in condition for allowance because: Claim 19 is rejected under 35 USC 112, 1st paragraph for lack of enablement due to the phrase "or preventing". Applicant argues that the specification is sufficiently enabling for the claim. However, it is the position of the examiner that the specification is enabling for "treating" damage to the skin, the specification lacks enablement for "preventing" damage to the skin. For example, it is the position of the examiner that damage to the skin can not be adequately predicted, such that it is not possible to determine if that damage has been prevented. Applicant further argues that other patents use the term "preventing" and as such, the term should be considered synonymous with the reduction of a symptom. This argument is not found convincing because it is noted that each application is examined on its own merits. Furthermore, it is the position of the examiner that "prevention" of a symptom is not the same as a reduction of a symptom, but that such reduction is closer to treatment rather than prevention.

Claims 1-20 are rejected under 35 USC 103(a) as being unpatentable over Ribier '166 in view of Subbiah '381 for reasons as stated previously. Applicant argues that there is a difference between a mixture of components and vesicles. Applicant's argument assumes that a mixture is a random solution of components while a vesicle is a discrete arrangement of components. As evidence of the difference, applicant cites specific processing steps in Ribier '166, asserting a vast contrast between the processing steps of Ribier '166 and a simple mixture of ingredients as claimed. However, it is noted that not all of the compositions made by Ribier involve complicated processing steps. For example, Ribier teaches that cosmetic compositions can be made by simple stirring of the chosen mixture of constituents (see col. 8, lines 4-46). Particularly in lines 23-31, Ribier teaches that vesicles are formed with simple stirring at room temperature of the chosen mixture of constituents, thereby obtaining vesicles. Therefore, it is the position of the examiner that the term "mixture" is not limited to random solutions but rather encompasses both random solutions of components as well as ordered compositions such as vesicles, particularly in view of the fact that some of vesicles taught by Ribier are formed spontaneously upon mixing. Applicant's arguments with respect to '381 are considered moot in view of the position of the examiner that the term "mixture" encompasses vesicles.

In response to applicant's arguments on page 5 and 6 of the response where applicant states that "the Examiner asserts that the feature of a mixture is not recited in the claims nor is it taught in the specification", it is the position of the examiner that the applicant has inaccurately summarized the Examiner's arguments. To clarify, the feature that applicant relies upon, but which is not recited in the claims or the specification, is the definition of a mixture as a random organization of the components. The examiner fully concedes that the applicant relies upon the feature of a "mixture". However, it is the position of the examiner that applicant's use of the term "mixture" is understood as including ordered compositions such as vesicles, particularly when the specification states that "the combination of these two components can be applied in any type of cosmetically or pharmaceutically acceptable vehicle for topical application with which the active component is compatible" (page 5, lines 12-13 of the instant application). In other words, while applicant would like to limit the definition of "mixture" to a random solution of components after the fact, there is no support for such a definition in the specification or claims. Therefore, the term "mixture" is broadly interpreted by the examiner to include both random and ordered compositions.